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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

BERNETTE FLOYD JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether the term "money of the United States" in 18 U.S.C. 649(a) includes checks payable to the United States.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 759 F.2d 342.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1985. The petition for a writ of certiorari was filed on June 6, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted on 19 counts of failing to deposit "money of the United States" in timely fashion, in violation of 18 U.S.C. 649. She was sentenced on the first count to one year's imprisonment with all but four months suspended in favor of five years' probation; sentence on the remaining counts was suspended. The court of appeals affirmed (Pet. App. A1-A13).

1. The evidence at trial, as summarized by the court of appeals (Pet. App. A2-A4), was as follows. Petitioner was a collection officer for the United States Forestry Service in Columbia, South Carolina. Her duties included receiving funds remitted to the Forestry Service in payment for timber, maps, and recreation permits sold to the general public. Between October 1981 and October 1982, petitioner failed 19 times to deposit remittances, together totalling $759,116.77. Of this total, $135.00 was in cash and $584.10 was by undetermined form of payment; the balance was remitted by check. Petitioner negotiated none of the checks; she did, however, have personal financial difficulties, which the government argued may have motivated her to fail to deposit the funds. Evidence was also introduced showing that the government lost approximately $56,000 interest as a result of petitioner's failure to deposit the funds in a timely fashion (C.A. Br. 8).

2. The court of appeals, affirming the convictions, held that a check is "money of the United States" within the meaning of Section 649. It found that Congress's "general purpose" of protecting public funds from loss would have been frustrated by limiting the term "money" to coin or currency (Pet. App. A11). "A failure to deposit either checks or cash involves similar risks—possible loss of the funds, deprivation of the use of the funds for at least some period of time, and failure of proper record keeping" (*id.* at A11-A12). The court concluded that, given the widespread use of checks, which has "completely overshadowed the use of currency," petitioner's interpretation of Section 649 "would drastically narrow the protection of public funds provided by the statute" (Pet. App. A12-A13). This, the court said, would do violence to the purpose of Congress, which could not have intended to leave misfeasance such as this without penalty (*id.* at A13).

ARGUMENT

Petitioner contends that the term "money of the United States" in Section 649 excludes checks. The court of appeals correctly rejected this contention, and the issue is not of sufficient importance to warrant review despite the existence of a conflicting decision.[1]

1. Section 649 prohibits the failure to deposit in timely fashion "money of the United States."[2] Statutory construction begins with the language of the statute, and statutory terms are given their ordinary and common meaning. *United States* v. *Albertini,* No. 83-1624 (June 24, 1985), slip op. 4-5; *Garcia* v. *United States,* No. 83-6061 (Dec. 10, 1984), slip op. 4 ("money" in 18 U.S.C. 2114 given ordinary meaning). The ordinary meaning of money is "something generally accepted as a medium of exchange, a measure of value, or a means of payment <have used gold, copper, wampum, or cattle for ~>". *Webster's Third New*

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[1]We note that the only count on which petitioner received jail time involved no allegations regarding checks; the money at issue was solely cash (Tr. 299-312, 558-559). As the petition concedes (Pet. 5-6,7), other counts involved cash as well. See also Pet. App. A5 n.2. Thus, even if petitioner were correct that only cash is covered by Section 649, it would not affect her sentence.

[2]Section 649 provides:

> (a) Whoever, having money of the United States in his possession or under his control, fails to deposit it with the Treasurer or some public depositary of the United States, when required so to do by the Secretary of the Treasury or the head of any other proper department or agency or by the General Accounting Office, is guilty of embezzlement, and shall be fined in a sum equal to the amount of money embezzled or imprisoned not more than ten years, or both; but if the amount embezzled is $100 or less, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> (b) This section and sections 643, 648, 650 and 653 of this title shall apply to all persons charged with the safe-keeping, transfer, or disbursement of the public money, whether such persons be charged as receivers or depositaries of the same.

International Dictionary Unabridged 1458 (1981) (first definition). Obviously, this includes a check.

The legislative history of Section 649, while scant, supports this interpretation. The term "money of the United States" in Section 649 dates to the modification of the criminal code in 1909 (35 Stat. 1105); the original version of the prohibition used the term "moneys of the United States" (11 Stat. 249).[3] Similarly, both the predecessor of 18 U.S.C. 648 and the present version, which petitioner concedes now includes checks (Pet. 20-21), use the term "public moneys." See 9 Stat. 63. Moreover, Congress has never indicated that the term "money" should be narrowly construed. Rather, Congress's evident purpose in enacting this statute was to protect all of its public funds from embezzlement by ensuring their timely deposit into the Treasury.[4] Accordingly, there is no reason to exclude a check, a common form of money, from Section 649. Indeed, because checks constitute a substantial part of modern commercial transactions, a holding that "money" is limited to coin and paper currency would significantly expose a large portion of public funds to loss and "do violence to the purpose of Congress." *United States* v. *Bramblett*, 348 U.S. 503, 509 (1955).

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[3]The deletion of the letter "s" was not intended to have substantive significance. See H.R. Rep. 2, 60th Cong., 1st Sess. 17 (1908).

[4]The original version of Section 649 was an amendment to an 1846 "Act to provide for the better Organization of the Treasury and for the Collection, Safe-Keeping, Transfer, and Disbursement of the public Revenue" (9 Stat. 59-66). This Act, written in terms of "public moneys" and "public money," seems certainly to have included non-cash money in its scope. The House Report for the 1846 Act stated that "in this [United States] treasury, all the public money, however derived, must be received, and must be safely kept," and that "the money must be actually kept on hand, ready to be inspected and counted * * * and ready to be paid out * * *." H.R. Rep. 309, 28th Cong., 1st Sess. 3-4 (1844). The purpose of the 1846 Act also argues against a narrow reading of Section 649's predecessor, added 11 years later.

The other sections of Chapter 31 ("Embezzlement and Theft") in Title 18 use, variously, "money," "public money," "sum," "money or property," and other terms; there is no reason to suppose that in this statute the term used is to be more narrowly defined than the others. Indeed, Subsection (b) of Section 649 itself uses another term, "public money," as the Fourth Circuit pointed out (Pet. App. A6-A7). And, as discussed above, in its early days Section 649 itself used the term "moneys of the United States"; the legislative history of the original version used both "money" and "moneys." Cong. Globe, 34th Cong., 3d Sess. 713 (1857). Finally, a narrow reading of the word seems especially implausible where the other parts of Chapter 31 using the bare term "money"—Sections 645, 646, and 647—appear on their face clearly to encompass non-cash moneys.

2. As petitioner correctly notes, a different conclusion was reached by the Tenth Circuit in *United States* v. *Fernando*, 745 F.2d 1328 (1984). There, the court held that checks payable to the United States government were not "money of the United States" under Section 649. The court reasoned that when the progenitors of Section 649 were enacted, checks were not common; therefore, Congress likely intended the term "money" to apply only to paper currency. Moreover, in the Tenth Circuit's view, Congress may have intended only to reach coin or paper currency because their liquidity makes it possible for an official to misuse them more easily than a check and thus cause greater harm to the government than is likely from the failure to deposit a check.

a. We believe our own analysis and the analysis of the Fourth Circuit, discussed above, are more convincing. In any event, the rationale of *Fernando* is flawed even on its own terms. First, its assertion that checks were not as commonly used in the 19th century as today is an unpersuasive consideration. Checks were in substantial use in

principal commercial cities by the beginning of the 19th century. J. Hurst, *A Legal History of Money in the United States 1774-1970* at 35 (1973). Thus, checks were a common form of money even when Congress enacted the progenitors of Section 649. By adopting the broad term "money" instead of specifying "coin" or "paper currency," Congress can reasonably be supposed to have intended to reach all forms of money.[5] Second, *Fernando's* assertion that Congress may have wanted to reach only funds that could be the most easily misused is speculative. Given the plain meaning of the term "money," to narrow the statute "on the basis of a gestalt judgment" as to Congress's intent is unreasonable. See *Garcia, supra,* slip op. 9. As cogently stated by the Fourth Circuit in this case (Pet. App. A11-A12):

> It can hardly be gainsaid that the purpose of section 649 is to protect the public funds of the United States from loss by imposing criminal liability on employees who breach their duty to deposit public funds. Nothing suggests that Congress, in enacting section 649 or any of its predecessors, believed some forms of public funds to be more vulnerable than others. A failure to deposit either checks or cash involves similar risks—possible loss of the funds, deprivation of the use of the funds for at least some period of time, and failure of proper record keeping.[6]

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[5]In any event, it is not explained why, if the common meaning of the term "money" had changed when Congress reenacted this statute, the earlier rather than the later meaning should control. If anything, as the meaning of the term "money" changed and the need to include checks to achieve the objectives of the statute became apparent, one would expect "money" to mean what it meant at the time of reenactment. Moreover, "even a criminal statute embraces everything which subsequently falls within its scope." *Browder* v. *United States*, 312 U.S. 335, 340 (1941) (citations omitted).

[6]The other two bases for the decision in *Fernando* — that some state courts use the narrow definition of money, and that Section 649 need not be interpreted broadly since other embezzlement statutes are

b. The conflict between this case and *Fernando* does not in any event merit this Court's review. This is a seldom-used statute. The annotation to Section 649 contains only four other cases (cf. Pet. 24), all decided more than 70 years ago.[7] The Department of Justice is aware of no other prosecution currently being conducted under this statute. This is not surprising. A custodian who fails to deposit government funds usually intends to convert those funds and takes fairly prompt steps to do so; such individuals can be and usually are prosecuted under Section 641 or 648. Using Section 649 makes sense only in the rare circumstances of a custodian who neither deposits the money nor converts it to her own use. And, of course, the conflict concerns only that small subclass of potential Section 649 prosecutions in which the custodian inexplicably retains money in the form of checks payable to the United States.[8]

The recentness of the split which has developed would also make review by this Court premature. Only the Fourth and Tenth Circuits have had to rule on the proper definition

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broad—are also unconvincing. The relevance of the state law cited in this context is attenuated, and the fact that other offenses could be prosecuted under other statutes is irrelevant.

[7]They are: *United States* v. *Mason*, 218 U.S. 517 (1910); *Higgins* v. *United States*, 185 F. 710 (6th Cir. 1911); *Dimmick* v. *United States*, 121 F. 638 (9th Cir.), cert. denied, 191 U.S. 574 (1903); *United States* v. *Greene*, 146 F. 778 (E.D. Ga. 1906).

[8]Petitioner raises the specter of Section 649 rendering Sections 641 and 648 "virtually unnecessary," but then implicitly recognizes why this has not been so (Pet. 20-21): Section 649 is limited on its face to a very small class of people and a very special sort of offense—where those who are required to deposit money with the Treasurer or some public depositary fail to do so. It is also unclear why, from a public policy standpoint, the prosecution of individuals like petitioner is "improper" (Pet. 23, 24-25). We note that the amounts involved in both this case and *Fernando* were quite substantial—$759,000 and $787,000 respectively.

of the term "money" in Section 649.[9] Should another case arise, the government expects to argue that the Tenth Circuit should reevaluate its decision in light of the court of appeals' decision in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1985

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[9] *Higgins* v. *United States*, *supra*, affirmed a judgment for failure to deposit "money order funds," but the precise issue of what "money order funds" were and whether they constituted "money" was not discussed.